

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MICHAEL GRECCO PHOTOGRAPHY INC., :

Plaintiffs, :

EVERETT COLLECTION, INC., :

Defendants. :

07 Civ. 8171 (CM)

DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS
PURSUANT TO LOCAL RULE 56.1

In support of their motion for summary judgment, defendant Everett Collection, Inc. ("Everett") hereby submits this Statement of Undisputed Material Facts pursuant to Local Rule 56.1:

Parties

1. Defendant Everett Collection, Inc. is a corporation duly created and existing under the laws of New York, with a principal place of business at 104 West 27th Street, New York, NY. Complaint, ¶ 3, Answer ¶ 3.

2. Plaintiff Michael Grecco Photography Inc. is a corporation doing business within the state of New York. Complaint ¶ 2.

3. Everett is an archive of publicity materials that relate to the entertainment industry. Harvey Decl. ¶ 2.

4. Everett operates an internet website at www.everettcollection.com. Complaint ¶ 20, Answer ¶ 20.

5. Everett's archive contains various images from popular television shows of the 1990's. Declaration of Ron Harvey ("Harvey Decl.") ¶ 10.

Grecco's Claims

6. Grecco alleges infringement of its purported copyrights in twenty two images (the "Images"). Complaint, ¶¶ 50-64

7. Butterfield Decl., Exhibit 3 (the "Chart") summarizes the title, Copyright application date and other details of the Images. Complaint, ¶¶ 21-23, Ex. A, Butterfield Dec., Ex. 3.

8. Grecco's Complaint attaches only four registrations bearing registration numbers VA 1-220-302, VA 1-220-303, VAu 632-558 and VA 1-298-835 (the "Registrations").

9. Plaintiff has produced no evidence that the Registrations apply to any of the Images. Complaint, Ex. B., Butterfield Dec. Ex. 5.

10. Grecco's Complaint also attaches applications for registration of copyright of the other eighteen Images. Complaint, Ex. B.

11. Everett's counsel requested registration certificates for the remaining photographs, but Grecco did not produce them. Butterfield Decl. ¶ 6, Exs. 4, 5.

12. Grecco has not registered copyright in the remaining Images. Complaint, Ex. B.

13. In lieu of deposit copies, Grecco's Complaint annexed photocopies of printouts from Everett's website containing the images referenced in Grecco's copyright applications and registrations. Complaint, Exhibits A, B.

14. Grecco maintains it was hired by various Hollywood television studios to create the Images on the terms contained in the invoices (the “Invoices”) which Grecco produced to Everett’s counsel herein. Butterfield Dec., Ex. 5.

15. The terms of the various Invoices include the terms reproduced on the chart attached to the Butterfield Dec. as Exhibit 6 (the “Terms Chart”).

16. Everett provides publishers and other users with access to publicly disseminated images. Harvey Decl.” ¶ 9.

17. Of the twenty two Images, Everett only made two available to publishers. Harvey Decl. ¶ 12.

18. Everett made the Image depicting Luke Perry (which bears no. 11 in the Chart) available to “Stuff Magazine” in May 2006 and the user was charged a total access fee of \$200.00. Harvey Decl. ¶ 12.

19. Everett made the Image of Xena from the show “Xena: Warrior Princess” (which bears no. 6 in the Chart) available to “In Quest Magazine” in February 2005 and the user was charged a total access fee of \$100.00. Harvey Decl. ¶ 12.

20. No other publisher made use of the other Images via access to the Everett database. Everett did not make any of the other Images available to be used by any publisher. Harvey Decl. ¶ 12.

21. Everett provides its clients with terms and conditions regarding the use of the photographs in its archive, expressly informing them that Everett is not the copyright holder of the images, and that Everett’s provision of those images is not a grant of any rights of reproduction, but merely a grant of access to previously disseminated images for editorial purposes. Harvey Decl. ¶ 8, 9.

Dated: New York, New York
July 1, 2008

COWAN, DEBAETS, ABRAHAMS
& SHEPPARD LLP

By: _____/s/_____

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